Supreme Court, U.S.
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No. 97-920

In The

Supreme Court of the United States

October Term, 1997

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARIAFELISSA SMITH,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Two

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE A. GIBBS
Counsel of Record
GROSSMAN & GIBBS
1510 Fourth St.
Berkeley, CA 94710
(510) 524-4141

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

It was held on appeal, and the State concedes here, that defendant's custodial statement was admitted at trial in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). In demonstrating that the error was harmless, does the prosecution bear the burden, pursuant to *Chapman v.* California, 386 U.S. 18 (1964), *Harrison v. United States*, 392 U.S. 219 (1968), and *Oregon v. Elstad*, 470 U.S. 298 (1984), of establishing that the illegally admitted statement did not induce the defendant's subsequent trial testimony?

PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

Respondent Mariafelissa Smith was convicted of second-degree murder in connection with the birth of her child. Respondent was the only witness to the birth, which occurred at her home. The central piece of evidence admitted at respondent's trial was a statement she gave at the police station at 12:30 a.m. after having been kept isolated and in custody at the station for over seven hours. At no time prior to eliciting respondent's statement did the police comply with the mandate of *Miranda v. Arizona* by advising respondent of her constitutional rights.

Respondent argued on appeal that her conviction must be reversed because admission of her un*Mirandized* statement violated the Fifth Amendment, and was not harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). The People *only* contested the question whether respondent was in custody at the time of the interrogation, and whether *Miranda* warnings were required. Neither in briefing nor in oral argument did they contend, or even suggest, that admission of the illegally obtained statement could be harmless. App. 36, n. 1.

The California Court of Appeal reversed respondent's conviction. It determined that respondent was in custody at the time of her interrogation, and was therefore entitled to *Miranda* warnings. (App. 12-33.) The court further held that, "There can be no doubt this error was prejudicial." The court explained:

> "It was only in her statements to [the detective] that appellant told the story of her baby being

> born into the toilet, damning herself by her admissions that she heard a gurgle (proving the baby was alive) yet left the baby with his head submerged in the toilet. We cannot assume appellant would have testified if these statements had been excluded. Without those statements, it could have been proved the baby was born alive – both pathologists so testified – and appellant disposed of his body in her garbage and told no one for several days, but the prosecution would have had no direct evidence of what in fact happened to the baby and no evidence to contradict appellant's initial report to the nurse and doctor that she had delivered the child in the shower and believed it was dead because it was blue and unmoving. Even if a jury could have believed appellant caused the baby's death, there would have been little or no evidence from which to find the intent required to prove murder. Clearly, admission of appellant's statements to [the detective] was not harmless beyond a reasonable doubt." (App. 33.)

The argument that the *Miranda* error was harmless appeared for the first time in the State's petition for rehearing. Petitioner there stated that the error did not require reversal because respondent's trial testimony (which came after her extrajudicial statement was erroneously admitted) related many of the same facts as the extrajudicial statement. The Court of Appeal disagreed, relying on *Oregon v. Elstad*, 470 U.S. 298, for the proposition that

> "if the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison v. United States* . . . precludes use of that testimony at retrial. 'Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.' " *Id.* at 316-317, quoting *Harrison*, 392 U.S. at 224-225. (App. 36, n. 1.)

The State sought review in the California Supreme Court. No justice of that court voted to review the decision.

For reasons detailed below, this case is entirely unworthy of certiorari. First, the State's failure to raise the harmless-error issue prior to its petition for rehearing effected a waiver of that issue under state law, and provides an adequate and independent state ground for the decision of the state appellate court.

Second, the California Court of Appeal's prejudice analysis was an unremarkable application of the law established by *Harrison v. United States* and *Oregon v. Elstad*, which are, in turn, unremarkable applications of the familiar harmless-error doctrine enunciated 35 years ago in *Chapman v. California*. Simply stated, that doctrine requires that "[t]he beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." 386 U.S. at 24.

The case may be different where the state does *not* introduce at trial the statement taken in violation of *Miranda*, but rather introduces only a subsequent extrajudicial *Mirandized* statement arrived at as a consequence of the earlier *Miranda* violation. In such a case, the taint from the unlawful interrogation has been dissipated, *Oregon v. Elstad*, 470 U.S. at 317-318, and the State violates no constitutional right by introducing the later statement. Where, however, as here, the State succeeds in putting before the jury a statement taken in violation of *Miranda*, the State clearly has become the beneficiary of a constitutional violation. *Chapman* then comes into play, and the State must shoulder the burden of demonstrating generally that the error did not contribute to the verdict, and specifically, that the defendant's trial testimony was not induced by the erroneous admission of the illegal confession.

Finally, there is no conflict among the circuits on this point, and petitioner suggests none. The petition should be denied.

1. The Petition Misrepresents The Nature And Severity Of The *Miranda* Violation

Before examining in greater detail the reasons for denying the writ, the Court should have an accurate picture of the nature and severity of the *Miranda* violation. The State's petition falsely portrays this case as involving nothing more than a minor, technical violation of *Miranda*. The extent of the State's report of the violation in this case is thus relegated to a single sentence in a footnote. Pet. 3, n. 1 ("The court of appeal relied mainly

on the fact that the defendant had been in the constant company of an officer or cadet (as required under police department rules for all 'civilians' inside the station) for seven and a half hours before being interviewed."). The true facts, as recited by the California Court of Appeal, reveal a flagrant, and probably deliberate, violation of the word and spirit of the *Miranda* rule. We recite those facts here because they are relevant to any harmless-error analysis.

Two uniformed officers appeared at respondent's door around 5:00 p.m. on April 19, 1996. Respondent was home alone. They told her that they had come in response to a call from Kaiser Hospital, which had reported to police that a baby had been born dead and was buried in the back yard. A uniformed sergeant arrived a few minutes later. Detective Michael Barbanica of the homicide squad arrived at respondent's apartment at 5:23 p.m., by which time the other officers had secured the scene. Barbanica was in charge of the investigation, and was armed. These four officers were then joined at the apartment by a fifth officer, Detective Passmore. Respondent was thus alone in her home with five police officers.

On entering the apartment, Barbanica told respondent he was there to investigate the death of her baby. The officers directed Barbanica to a garbage bag on the balcony. Before Barbanica opened the bag, respondent went into the back bedroom. She was followed by a uniformed officer who remained next to her the entire time she was there. Barbanica opened the bag, found the baby and determined that it was dead. Barbanica then asked respondent to accompany him to the police station

to talk to him about what had happened. Barbanica testified that he made it clear to respondent that she was not under arrest, and there was no criminal investigation, "specifically a homicide." Respondent agreed to go to the station, but she testified that she felt like she had no choice.

Before she left the apartment, respondent told the officers that she wanted to call her husband. "They told me they didn't want me calling my husband, that they wanted me to go to the police station." Respondent was not permitted to make the call. Nor was she permitted to make any arrangements for her two small children. A uniformed officer then transported respondent directly to the police station.

Barbanica instructed two officers to remain at the apartment in anticipation of appellant's consent to search or the issuance of a search warrant. Barbanica also called the district attorney to advise him of his intention to obtain a search warrant for respondent's residence.

At the station, a uniformed officer escorted respondent to a room in the rear of the station. The officer told a janitor there to leave because the officer "needed to stay here with [respondent] and he didn't want nobody else in the back room." The officer sat right next to respondent. At some point, the officer, who had on a light blue uniform which respondent understood to be worn by cadets or rookie officers, took respondent to another room. The officer told respondent that he had been assigned to watch her. In respondent's presence, the officer made a call to his father and said, "I have to stay

afterwards because I have to watch this person that's in here."

Respondent needed to use the restroom in the station. She was escorted to the restroom by the officer. The officer stood outside the door of the restroom while respondent was inside, then escorted her back to the room. At one point, respondent asked if she could smoke a cigarette. The officer left to ask Detective Barbanica if respondent could go out and smoke. The officer returned and told her that "Barbanica wanted me to stay put and not to go anywhere. So I couldn't smoke."

At around 6:30 p.m., Barbanica spoke to respondent in the interview room at the station. He asked respondent for her consent to search her apartment. Respondent would not consent, and Barbanica told her that he was going to obtain a search warrant. During this conversation, Barbanica also told respondent that she needed a medical examination at a hospital to determine if she was bleeding internally. Barbanica testified that he told respondent that the visit was "voluntary; however, we would have an officer give her a ride over there." Respondent told Barbanica that she already had a scheduled appointment the following day with her physician at Kaiser in Antioch. "But then he said, 'I'd rather you get it done tonight,' and there was an appointment scheduled for me." Barbanica "insisted" that she go that evening. At the end of the conversation, respondent was "walked back to the report writing room," and Barbanica left to "write a search warrant."

Respondent was transported to the hospital in a marked police car by Detective Passmore. Passmore

remained with respondent the entire time she was at the hospital. While respondent was in the examination room, Passmore sat outside the door. Respondent did not feel that she was free to leave the hospital, and apparently was not permitted to leave the examination room.

Barbanica obtained a search warrant for appellant's apartment and for a sample of her blood between 10:00 p.m. and 11:00 p.m. He notified Detective Passmore, who was still at the hospital with respondent, of the warrant. Blood was then drawn from respondent. In the meantime, the search of respondent's apartment had begun. Respondent was at the hospital for one to two hours. After the examination, Detective Passmore drove her back to the police station, where she was placed in a small interrogation room. She was escorted in and out of the interview room by officers, and there was no time when she was allowed to freely enter or leave the interview room by herself. Respondent did not believe she was free to leave this room or the police department.

The interview began at approximately 12:30 a.m., some *seven* hours after respondent was removed from her apartment and had been committed to the constant custody of police officers. The search of respondent's apartment was under way when Barbanica began his interrogation.

The interrogation was video recorded. The videotape reveals that the interrogation room measured approximately five feet by eight feet. There were two chairs in the room, which was otherwise barren of furnishings or wall hangings. There was only one door, which was located on one of the five foot walls. Respondent was

seated against the back corner, opposite the door. The second chair, to be occupied by the detective, was placed at an angle in the middle of the room, between respondent and the door. During the interrogation, the detective frequently moved himself to within inches of appellant.

Detective Barbanica entered the room and closed the door. He seated himself between respondent and the door. Respondent could not leave the room without virtually crawling over the detective. Barbanica told respondent she was not under arrest and was free to leave. In light of the restrictions that had been placed on her movement, however, respondent did not feel she could freely leave the room. Barbanica informed respondent that he was trying to get to the bottom of the matter. Respondent said she was worried about her children. The detective told her the children were all right. Respondent related the events surrounding the birth of the baby. Barbanica told respondent that the matter was "very serious." He told her that "this is what I do for a living," and that he is very good at his job. He told her that an officer was right then at her apartment collecting evidence, and that officer is good at his job. He said there will be an autopsy tomorrow by a coroner, who also is good at his job. He urged her to tell the truth. A few minutes later, the detective reiterated that evidence is "being collected now" at your house, and that officers had in fact "found evidence." When respondent asked what they had found, the detective said he would get to that later.

The detective left the room at 12:44 a.m.for twelve minutes, at 12:58 a.m. for four and a half minutes; at 1:15 a.m. for six minutes and again at 1:48 a.m. Each time the

detective left, he closed the door behind him, shutting respondent in the small room. After going over respondent's version of the events several times, at approximately 1:30 a.m., Barbanica formally placed respondent under arrest.

At 1:30 a.m., some *eight* hours after being removed from her home, prohibited from calling her husband, unable to verify the welfare of her children, subjected to continuous and restrictive police guard, taken to a hospital, and placed in a small closed room for an extended interrogation, Detective Barbanica finally advised respondent of her constitutional rights. It may be ironic, but it is hardly surprising, that respondent invoked her right to remain silent.

REASONS FOR DENYING THE PETITION

1. The State's Failure To Raise The Harmless-Error Claim Until The Petition For Rehearing Effected A Waiver Of That Issue And Constitutes An Independent And Adequate State Ground For The Court Of Appeal's Decision.

As the California Court of Appeal's decision expressly recounts, the State contended on appeal *only* that the trial court's denial of the motion to exclude respondent's extrajudicial statement was correct because respondent was not in custody at the time the statement was made and she was therefore not entitled to any *Miranda* warnings. App. 36, n. 1. The State never contended that the error could be harmless. The Court of Appeal's decision is explicit on this point: "[Respondent]

specifically noted this absence of harmless error in its reply brief and [the State] did not contest the point until after our initial opinion. In a petition for rehearing, [the State] assert[ed] for the first time the error in admitting appellant's statement is harmless because her trial testimony tells the same story as the extrajudicial statement." *Id.*

In opposition to the petition for rehearing, respondent relied in part upon the well-established rule in California that a contention "made for the first time on appeal on petition for rehearing . . . , whatever the merits, is untimely. (Rule 29, subd. (b), Cal. Rules of Court.) *Clemente v. State of California*, 40 Cal.3d 202, 216, n. 6 (Cal. 1985)." The Court of Appeal's recitation of the State's failure to raise the issue prior to the petition for rehearing can only be interpreted as an adequate and independent ground for its rejection of the State's contention. See *Sochor v. Florida*, 504 U.S. 527, 534 (1992).

2. The California Court of Appeal Correctly Applied The Harmless-Error Analysis Mandated By *Chapman v. California*, *Harrison v. United States*, and *Oregon v. Elstad*.

In a rather convoluted argument, the State concludes that its petition requires this court to decide whether *Harrison v. United States* has been overruled *sub silentio* by *Oregon v. Elstad*. The State is wrong, simply because it fails to distinguish between the prosecution's introduction of an untainted confession as in *Elstad*, which violates no constitutional right of the defendant at trial, and its introduction of an illegal confession, which clearly

does violate a constitutional right at trial. In the latter circumstance, *Chapman v. California* requires the prosecution to prove, as the beneficiary of the trial error, that admission of the illegal confession did not induce the defendant to testify.

In *Harrison*, the defendant took the stand in an effort to rebut illegally obtained confessions that the government had been permitted to use against him in their case-in-chief. Harrison's conviction was overturned on appeal because of the introduction of the confessions. On retrial, Harrison's earlier trial testimony was read to the jury and led to a second conviction. This court reversed, reasoning that if Harrison had testified "in order to overcome the impact of confessions illegally obtained *and hence improperly introduced*, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." 392 U.S. at 223 (emphasis added). In placing the burden on the prosecution, the court relied on *Chapman v. California*, for the proposition that "Certainly error . . . in illegally admitting highly prejudicial evidence . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Harrison*, 392 U.S. at 224, n. 12.

Oregon v. Elstad did not disturb *Harrison's* holding or rationale. It, too, recognized that, while the prosecution does not violate any constitutional right of a defendant by admitting *only* an untainted confession, it surely does violate a constitutional right by putting before the jury an illegally obtained one. Thus, *Elstad* states in rather unequivocal terms that "If the prosecution has actually violated the defendant's Fifth Amendment rights by

introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison v. United States* . . . precludes use of that testimony on retrial." 470 U.S. at 316-317. Harkening back to the *Chapman* harmless-error analysis, the court continued: "Having released the spring by using petitioner's unlawfully obtained confessions against him, the government must show that its illegal action did not induce his testimony." *Id.* at 317.

The State tries to avoid the reach of these statements through the truly shocking assertion that introduction of an illegal confession, obtained in violation of *Miranda*, does not violate the constitution. Pet. at 12-14. The State fundamentally misapprehends this court's *Miranda* jurisprudence.[1] As explained in *Oregon v. Elstad*, when the

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[1] The State's position that admission at trial of an un*Mirandized* statement violates no constitutional right is also contrary to the express holding of *Orozco v. Texas*, 394 U.S. 324, 326 (1969) ("We . . . hold that the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda."). The State's position is also contrary to the law applied in every circuit wherein *Miranda* error is subjected to harmless-error analysis under *Chapman v. California*, 386 U.S. 18, the standard which of course is reserved for federal constitutional error. See *United States v. Batista-Polanco*, 927 F.2d 14, 20-21 (1st Cir. 1991); *United States v. Quiroz*, 13 F.3d 505, 512-513 (2d Cir. 1993); *United States v. Cummiske*, 728 F.2d 200, 204 (3d Cir. 1984); *United States v. Baldwin*, 691 F.2d 718, 723- 724 (5th Cir. 1982); *United States v. Soto*, 953 F.2d 263, 265 (6th Cir. 1992); *Savory v. Lane*, 832 F.2d 1011, 1016 (7th Cir. 1987); *Howard v. Pung*, 862 F.2d 1348, 1351 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989); *United States v. Troise*, 796 F.2d 310, 314 (9th Cir. 1986); *United States v. Parra*, 2 F.3d

police question a suspect in violation of *Miranda*, any statement so obtained is "presumed compelled," and accordingly must be "excluded from evidence at trial in the State's case in chief." 470 U.S. at 317. The presumption of compulsion is "irrebuttable," *id.* at 307, and introduction of such presumptively coerced statement therefore violates the due process guarantee of the Fifth Amendment. While the failure to *administer Miranda* warnings may not constitute a Fifth Amendment violation, *introduction* into evidence of statements taken in violation of *Miranda* surely does. *Oregon v. Elstad*, 470 U.S. 306-307, n. 1, and 349 (Stevens, J., dissenting) ("the Court holds squarely that there is an 'irrebuttable' presumption that such confessions are indeed coerced and are therefore inadmissible under the Fifth Amendment except in narrow circumstances.")

The rule that the State, as the beneficiary of constitutional error, prove that an illegal confession did not induce a witness's subsequent testimony and thereby contribute to the verdict has been reiterated as recently as *Arizona v. Fulminante*, 499 U.S. 279 (1991). There, in evaluating whether introduction of an illegal confession could be harmless, a majority of the Court held that, pursuant to *Chapman v. California*, the State must meet "its burden of demonstrating that the admission of the confession . . . did not contribute to Fulminante's conviction." *Id.* at 295. The Arizona Supreme Court had held that introduction of the confession was harmless in part

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1058, 1068 (10th Cir. 1993); *Martin v. Wainwright*, 770 F.2d 918, 922 (11th Cir. 1985)

because it was reiterated at trial by another defense witness. In rejecting the state court's analysis, the Court observed that a finding of harmlessness "overlooks the fact that had the confession not been admitted, there would have been no reason for Sarivola to testify. . . . " *Id.* at 300. A majority of this Court in *Fulminante* thus engaged in the very sort of harmless-error analysis the State claims is precluded by *Elstad*.

As the Court has recognized in *Harrison*, *Elstad*, and most recently in *Arizona v. Fulminante*, when the defendant has suffered a Fifth Amendment violation by introduction of a presumptively or actually coerced statement, then the burden falls on the prosecution as beneficiary of the constitutional error to demonstrate its harmlessness. That is all the California Court of Appeal held in respondent's case.

3. There Is No Conflict Among The Circuits On The Application Of *Chapman v. California* To Require The State, As The Beneficiary Of A Constitutional Error, To Prove Beyond A Reasonable Doubt That The Error Did Not Induce The Defendant To Take The Stand.

Nor is there any conflict among state or federal courts on this point. The State cites no such split in authority. Indeed, the decisions the State does cite reflect a correct understanding of the *Chapman-Harrison-Elstad* rule. E.g. *United States v. Pelullo*, 105 F.3d 117, 125 (3d Cir. 1997) (reviewing court must determine "whether there was a constitutional violation . . . and whether the defendant would have testified anyway even if there had been no constitutional violation."); *Kordenbrock v. Scroggy*, 919

F.2d 1091, 1098 (6th Cir. 1990) (defendant did not waive *Miranda* claim by testifying because "the trial court overruled defense counsel's objection to the admission of his confession before trial . . . Kordenbrock's strategic decision to confess the homicide but not the element of premeditation to the jury in his opening statement was a response to the trial court's pretrial ruling.").

There is no conflict of authority that calls for review by this Court.

CONCLUSION

For the foregoing reasons, this case does not merit review by this Court.

Dated: January 30, 1998

Respectfully submitted,

LAWRENCE A. GIBBS
GROSSMAN & GIBBS
1510 Fourth St.
Berkeley, CA 94710
Counsel for Respondent